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No. 10-814

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

MORTIMER OFF SHORE SERVICES, LTD.,

Petitioner,

v.

FEDERAL REPUBLIC OF GERMANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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REPLY BRIEF

The issues presented in Mortimer Off Shore Services, Ltd.'s ("Mortimer") petition fully satisfy this Court's criteria for certiorari. The Second Circuit's decision misreads the Foreign Sovereign Immunities Act ("FSIA") to bar courts from entertaining suits based on foreign states' undisputed commercial activity, merely because of an intermediate state or government succession. If left to stand, it will make the Wall Street debt market shudder, due to the hundreds of billions of dollars in outstanding sovereign debt implicated by the circumstances of this case. The Second Circuit's decision interferes with the sanctity of sovereign debt contracts, permitting countries and municipalities to benefit from loan proceeds for their territories while escaping repayment obligations. It creates a split of legal authority among the circuits, *see World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310, 1315 (11th Cir. 2010), and abrogates this Court's longstanding rule that "a mere change of sovereignty" does not serve to extinguish public debt obligations. *See Vilas v. City of Manila*, 220 U.S. 345, 353-54 (1911). It is also incompatible with this Court's FSIA jurisprudence, which covers suits based on acts by a predecessor. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The FSIA was enacted to ensure that foreign states that engage in commercial activity are on a level playing field with other commercial actors. The Second Circuit's decision construes the FSIA's

jurisdiction provisions to create an artificial distinction between the counterparties to commercial transactions with states that underwent a succession event, and those that did not. The need to preserve the sanctity and enforceability of sovereign debt instruments that, like the bonds at issue in this case, are issued and traded by United States financial institutions and other investors is a matter of great national and international importance that demands review of the Second Circuit's decision. Indeed, suits against Respondent Federal Republic of Germany ("Germany"), hardly considered by the markets to be a serious default risk, are currently pending in district courts in the First, Second, Seventh, and Eleventh Circuits. The Court should grant certiorari to address the important statutory issues this case presents.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS

The Second Circuit's decision that "automatic assumption of liability by a successor state . . . would not meet the requirements of the FSIA's commercial activity exception" conflicts with decisions of other courts of appeals and would abrogate decisions of this Court. Pet. 20-26. Its rationale is illogical and unsupportable on its face given the irrefutable commercial nature of sovereign debt.

1. Germany's attempt to downplay the conflict between the decision below and *World Holdings* fails.

Opp. 4-6. The Second Circuit's holding that "[a]ccession to liability by the rules of customary international law entails no action by the successor state," Pet. App. 30, would have required dismissal in *World Holdings* because Germany's predecessor state or government issued and sold the debt obligations in that suit in the period before World War II, and the court did not identify any post-succession commercial activity on which to predicate jurisdiction.

Germany claims that "[t]here was no question in *World Holdings* that the commercial activity exception applied . . . because Germany was the issuer of the bonds and not a third party that allegedly became liable on the bonds by state succession." Opp. 5. But guaranteeing another party's performance is no less an affirmative commercial activity than issuing bonds. Pet. 11 (quoting *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94, 99 (2d Cir. 1999); *Tonoga, Ltd. v. Ministry of Public Works & Hous.*, 135 F. Supp. 2d 350, 356 (N.D.N.Y. 2001)). In addition, Mortimer's claims are not only grounded in Germany's liability by state succession, but also in Germany's predecessor state or government's activity guaranteeing the bonds through its dissolved political subdivisions before World War II. Pet. 12, 23 n.2. Germany's purported distinction is legally meaningless and ignores Mortimer's allegations.

It is also of no moment that the Eleventh Circuit's decision addressed and rejected Germany's argument that an extant treaty, Certain Matters Arising from the Validation of German Dollar Bonds,

4 U.S.T. 885 (1953) ("1953 Treaty"), superseded the FSIA and precluded the Court from exercising jurisdiction. Opp. 4-5. The only reason that it was necessary for the court to consider this argument was because of its antecedent determination that Germany's "issuance and sale of bonds within the United States" in 1924 and 1930 constituted commercial activity. 613 F.3d at 1315.

Finally, Germany's concession in *World Holdings* "that the commercial activity exception applied" to pre-World War II commercial activity, Opp. 5, does not ameliorate the conflict between the decision below and *World Holdings*. Waiver of immunity under the FSIA can only occur where a court determines that 28 U.S.C. § 1605(a)(1)'s waiver provisions are satisfied, and the Eleventh Circuit expressly refused to make that finding. Pet. 24 (citing 613 F.3d at 1317 n.12). Germany's purported distinction evidences its tactic to take inconsistent positions in litigation, but does not cure the split between the Second Circuit's decision and *World Holdings*.

2. Germany's claim that the decision below does not conflict with this Court's decisions in *Vilas* and *Altmann* is incorrect. Germany alleges that there is no conflict with *Vilas* because that decision was decided before the FSIA was enacted. Opp. 6. The date of the FSIA's enactment is irrelevant – Germany concedes that the FSIA applies to conduct that occurred before its enactment. Opp. 6. As such, the Second Circuit's decision construes the FSIA as an effective bar to this Court's holding in *Vilas* that a

"mere change of sovereignty" does not serve to extinguish public debt obligations. 220 U.S. at 353-54.

Germany is similarly incorrect when it states that the decision below does not conflict with *Altmann*. Opp. 6. *Altmann* holds that the FSIA applies to conduct that occurred before the FSIA's enactment. *See* 541 U.S. at 697-98. There would have been no reason for the Court to answer this question if Austria was not subject to suit under the FSIA for property that was allegedly taken unlawfully by Austria's predecessor state or government. Pet. 22. Under the rule articulated by the court below – that successor states or governments are not liable for acts of their predecessors that constitute a waiver of immunity under the FSIA – Austria could have avoided suit simply by pleading that the property in question was taken by a predecessor. This fact illustrates the conflict between the decision below and *Altmann*, and emphasizes the importance of the issues presented by the Petition.

3. The brief in opposition ignores other conflicts Mortimer identified in its Petition. For instance, Germany does not contest that the decision below conflicts with the D.C. Circuit's decision in *Agudas Chasidei Chabad of United States v. Russia*, 528 F.3d 934 (D.C. Cir. 2008), in which the court exercised jurisdiction over Russia and its instrumentalities for property unlawfully taken by its predecessor, the Soviet Union. Pet. 24-25. These conflicts are sufficient to merit the Court's exercise of its certiorari jurisdiction, both by themselves and in conjunction

with the other important, recurring issues Mortimer identifies.

II. THE PETITION PRESENTS RECURRING ISSUES OF NATIONAL IMPORTANCE

Germany's response to Mortimer's thorough explanation of the significance of the sovereign debt market tacitly acknowledges the importance of the issues raised by the Petition, including protecting the sovereign debt market, but misapplies the Court's criteria for certiorari and downplays or ignores the recurring nature of these issues.

1. Germany effectively reinforces the need to protect the rights of sovereign debt holders by acknowledging that "the Petition reads exactly like what an advocate would present to a committee of the Congress." Opp. 8. Congress did in fact protect these interests by enacting the FSIA, which was designed to place counterparties to foreign states' commercial transactions on par with other economic actors. Pet. 14-15. The decision below ignores the FSIA's plain language that "activity . . . by the foreign state" encompasses predecessor governments and states, and thereby frustrates Congress's intent. *Id.* Contrary to Germany's suggestion, Mortimer's explanation of the importance of preserving a vibrant sovereign debt market comports with this Court's criteria for certiorari, *see* Sup. Ct. R. 10, and is not an argument that the FSIA "is unwise legislation." Opp. 8. Rather, the importance of these markets speaks to Congress's

purpose in enacting the FSIA, the proper interpretation of the statute in light of that purpose, and the severe consequences of the Second Circuit's decision to construe the law otherwise. Countries and municipalities would effectively be granted the right to receive billions of dollars in loan payments for the benefit of their territories, while wholly escaping repayment as a result of even a minor change of state or government.

2. Germany's claim that the Petition does not present frequently occurring legal issues is not correct. Opp. 9. Both state succession and sovereign default are common occurrences, and the incidence of sovereign default has escalated as global economic conditions have deteriorated. Pet. 32-33. The Second Circuit's decision, which governs suits brought in the United States' largest financial forum, would allow successor states or governments to dishonor their predecessors' debts without concern for legal recourse. The debt markets on Wall Street will shudder at the concept of rendering large quantities of outstanding sovereign debt obligations unenforceable.

With respect to Germany, a country not generally considered to be a sovereign debt default risk, the Petition identifies seven pending actions in which the respondent's amenability to suit in connection with its predecessor states or governments' commercial activity was at issue. Pet. 8. Germany ignores four of these suits entirely. *Compare* Pet. 8, with Opp. 9. Germany's argument that the remaining three cases are distinguishable is flawed. *World Holdings* directly

splits with the decision below. *See supra* 2-4. *Bleier v. Bundesrepublik Deutscheland*, No. 08-CV-6254 (N.D. Ill. filed Nov. 3, 2008), concerns a different bond issue than in this case, Opp. 9, but the legal issues are indistinguishable: the Second Circuit's decision was predicated on German state or government succession, not on the series of bonds Mortimer sought to redeem. And finally, *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany, et al.*, No. 10-1151 (D. Mass. filed Sept. 10, 2010), includes a plaintiff who was not party to this action and breach of contract claims predicated on a specific guaranty agreement that the court below did not consider.

In light of these pending suits, Germany's claim that "[t]he facts surrounding the application of the FSIA and its exceptions to the unique situation that arose in post-war Germany . . . do not . . . raise a recurring issue of federal law of national importance" is not credible. Opp. 9. Rather, these issues have already recurred, and given the enormous value of the bonds repudiated by Germany, are certain to continue to recur. Pet. 31-32.

III. REVERSING THE DECISION BELOW WOULD CHANGE THE OUTCOME OF THE UNDERLYING ACTION

Germany's claim that Mortimer's claims would be dismissed if the Court issued the writ and reversed misrepresents the decision below. Opp. 7-8.

The Bonds at issue in this action were severally issued pursuant to specific percentages of liability by fourteen state-owned municipal banks. Pet. App. 5. All of these banks were in Germany at the time of issuance; after World War II, some of the *länder* that owned the banks were incorporated into the Federal Republic of Germany (in relevant part "West Germany"), and others incorporated into the German Democratic Republic ("East Germany"). Pet. App. 5. Thus, while there was one physical bond, there were two distinct sets of issuers: West German issuers and East German issuers.

The Second Circuit's decision that West German issuers' obligations must be validated was predicated on its construction of the 1953 Treaty and Validation Law for German Foreign Currency Bonds, Aug. 25, 1952, BGBl.I, at 553 (F.R.G.) ("Validation Law"). Pet. App. 44-47. The Second Circuit explained that the Treaty's purpose was to facilitate "the 'orderly settlement of,' debts owed by territory that became West Germany after World War II." Pet. App. 11.[1] As such, "the category of bonds at issue in this case [ ] are included in the schedule of foreign currency bonds covered by the Validation Law," Pet. App. 11, but that

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[1] *See also* 28 Dep't St. Bull. 376, 380 (Feb. 26, 1953) (explaining that the 1953 Treaty "does not apply to dollar bonds issued by public or corporate entities having their seats in that part of Germany which is under Soviet control or Polish administration. . . .").

Schedule *expressly excluded* the Bonds' non-West German issuers, Validation Law, BGBl.II, at 327, Schedule C.IV.[2]

The Second Circuit then noted that a later bilateral treaty, Second Agreement Regarding Certain Matters Arising from the Validation of German Dollar Bonds, U.S.-F.R.G., Aug. 16, 1960, 12 U.S.T. 944, "did not extend the Validation Law to the Agricultural Bonds issued in the territory that became East Germany." Pet. App. 13. Nor did the Unification Treaty, which the Second Circuit recognized expressly provided that the Validation Law would not enter force for entities located in East Germany. Pet. App. 41 ("Article 11's plain language only *excludes treaties listed in Annex I from being extended to former East German territory*.").

Given the decision below that neither the 1953 Treaty nor the Validation law applied to the East German issuers, Germany's statement that "the East Germany portion of the Bonds would have been on the same legal footing as the West German portion," Opp. 7, is untenable. On remand, Mortimer's claims would not be barred with regard to the East German

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[2] *See also* Agreement on German External Debts art. 4(2)(b), U.S.-F.R.G., Feb. 27, 1953, 4 U.S.T. 445, 448-49 (1953) (limiting the scope of the treaty to debts "owed by a person, whether as principal or otherwise, and whether as original debtor or as successor, who . . . resides in the currency area of the *Deutschemark West*").

issuers, which comprise approximately 65 percent of the Bonds' value.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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